waiver provision is therefore inapplicable here. That claim is incorrect.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Court stated that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 124 S. Ct. at 2537 (emphasis and internal quotation marks omitted). Petitioner contends that her plea agreement's reference to the "maximum [sentence] permitted by statute" should be construed in the same manner. Pet. 5; see Pet. App. 4a, 6a.

The courts of appeals have uniformly rejected similar claims, holding that, when an appeal-waiver provision of a plea agreement contains an exception for sentences above the "statutory maximum," the term "statutory maximum" refers to the maximum sentence that is authorized by the statute of conviction, without regard to any further restrictions that this Court's Sixth Amendment jurisprudence may impose in a particular case. See, *e.g.*, *United States* v. *Smith*, 413 F.3d 778, 780-781 (8th Cir. 2005); *United States* v. *Cortez*, 413 F.3d 502, 503 (5th Cir. 2005); *Luebbert*, 411 F.3d at 603; *United States* v. *Maldonato*, 410 F.3d 1231, 1233 (10th Cir. 2005); *United States* v. *Blick*, 408 F.3d 162, 169 n.7 (4th Cir. 2005) (collecting cases). That interpretation of the appeal waiver reflects a recognition that the parties to a plea agreement normally intend that terms appearing in the contract will be given their ordinary and natural

meaning, and that the ordinary meaning of "statutory maximum" is the maximum sentence authorized by the statute of conviction. See *Cortez*, 413 F.3d at 503; *Green*, 405 F.3d at 1193. There is no reason to give a different construction to the phrase "maximum [sentence] permitted by statute" as it appears in the appeal-waiver provision of petitioner's plea agreement.

As the court of appeals recognized (Pet. App. 9a), another provision of petitioner's plea agreement reinforces the natural reading of the disputed appeal-waiver language. Paragraph 4 of the agreement states that the district court at sentencing "may impose a statutory maximum term of imprisonment of up to five (5) years." Plea Agreement para. 4; see Pet. App. 5a. "In that provision, 'statutory maximum' unquestionably means the maximum permitted by the statute itself, undiminished by any *Apprendi/Booker* considerations." *Id.* at 9a. Under petitioner's construction of the appeal-waiver provision, "materially identical terms in the same contract" would be given "substantially different" meanings, a result at odds with established contract-law principles. *Ibid.*

Finally, under the remedial holding of this Court in *Booker*, the district court in this case *was* authorized to increase petitioner's sentence based on the court's own factual findings, up to the maximum set forth in the statutes defining the offense of conviction. See 125 S. Ct. at 750, 768-769. The constitutional error in Guidelines sentences imposed before *Booker* resulted not from the fact that sentencing courts relied on their own findings in determining the applicable Guidelines ranges. Instead, it resulted from the courts' treatment of such Guidelines ranges as mandatory rather than advisory. See, *e.g.*, *United States* v. *Rodriguez*, 398 F.3d 1291, 1301 (11th

Cir.), cert. denied, 125 S. Ct. 2935 (2005). As a result of the Court's remedial holding in *Booker*, petitioner cannot complain about the *duration* of her sentence, but only could say that it was imposed by the wrong process (*i.e.*, a mandatory one). That does not translate into a claim that she received a sentence above the "maximum permitted by statute."

3. The petition for a writ of certiorari raises no legal issue of broad and recurring importance. Now that this Court has issued its decision in *Booker*, district courts can be expected to treat the federal Sentencing Guidelines as advisory rather than mandatory. To the extent that defendants entering into appeal-waiver agreements wish to preserve their right to appeal allegedly "unreasonable" sentences, see *Booker*, 125 S. Ct. at 765-767, they can bargain for contractual language that clearly reflects that intent. The number of cases that would be affected by this Court's resolution of the question presented is limited and can be expected to diminish with time.

4. Even if the appeal-waiver provision of petitioner's plea agreement were construed not to encompass her *Booker* claim, it is unlikely that she would obtain any relief in the Eleventh Circuit. Because petitioner did not raise a Sixth Amendment challenge to her sentence at trial or in her opening brief on direct appeal, the court of appeals would likely treat that claim as abandoned. See, *e.g.*, *United States* v. *Vanouden*, 414 F.3d 1321, 1322-1323 (11th Cir. 2005); cf. Pet. App. 4a n.1 (noting, but expressing no view on the merits of, the government's contention that petitioner's *Booker* claim was "procedurally barred"). In addition, under the remedial approach adopted in *Booker*, the only relief to which petitioner could even arguably be entitled is a remand

for resentencing under the current advisory Guidelines regime. Because the district court departed downward from the applicable Guidelines range at the original sentencing proceeding (see p. 4, *supra*), there is no reason to suppose that the court would have imposed a more lenient sentence if it had treated the Guidelines as advisory rather than mandatory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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